(3)

Supreme Court, U.S.
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No. 95-1066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

Richard & Linda Simone/Jointly - PETITIONERS

Vs.

Worcester County Institution for Savings- RESPONDENT

APPELLANTS PETITION FOR REVIEW OR REHEARING

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

By PETITIONERS

Richard & Linda Simone, Pro-Se
11 Ida Road
Worcester, Ma. 01604
Tel: (508) 752-0795

29pp

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EDITOR'S NOTE

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OPINIONS BELOW, CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

On June 4, 1992, the U.S. Bankruptcy court for the district of Massachusetts (Queenan J), dimissed petitioners complaint. Petitioners appealed.

On December 21, 1993 U.S. District Court (Gorton,N) affirmed the judgement of the U.S. Bankruptcy Court. (Pet. App. A.)

On June 23, 1994 U.S. District court denied Motion for Newly discovered evidence, & ordered both parties to submit copies of the trial transcript of the June 4, 1992 trial.(Pet.App.B)

On August 12, 1994 U.S. District Court(Gorton,N.) affirmed the judgment of the U.S. Bankruptcy Court. (Pet.App.C). Petitioners Appealed.

On April 20, 1995 Petitioners appeal & request for rehearing was denied.(Pet. App. G.).

Petitioners rely on U.S. Bankruptcy Rule 9024 (60) b Mistake, Inadvertance or Fraud at trial, of which petitioners claim their rights to a Fair trial & Due Process at trial were violated & Fed. Rule 615 Petitioner Linda Simone's Rights during sequestration were violated. & Massachusetts Consumer Protection Act(M.G.L.ch.93 A.) Respondent misrepresented petitioners property on November 16, 1990 & again on June 13, 1991.& used deceptive acts & practices after the sale. (Pet.App.K & L).

STATEMENT OF THE CASE

Petitioners submit this reply brief in response to the Respondents brief in opposition. This brief addresses Respondents' reliance on & the U.S Court of Appeals' reliance on the opinion of the U.S. District Court Order dated December 21, 1993 (Pet.App.A). Petitioners will show how: this Order was Clearly Erroneous & in Error as a matter of fact & Law., which caused

the Opinion of the U.S. Court of Appeals to be clearly erroneous & in error as a matter of fact & Law by its reliance on that same Order, which basically recited the opinion of the U.S. Bankruptcy Court Order of June 4, 1992., of which petitioners have argued on appeal was in error and clearly erroneous as a matter of fact & law. This reply brief provides Petitioners reasons to Grant the Petition.

STATEMENT OF FACTS

1. Petitionser's were represented at U.S. Bankruptcy Court adversary proceeding on June 4, 1992 by counsellor Paul H. Merry of Boston Ma. The complaint contended that the respondent misrepresented the petitioners 2-family property by advertising it as a single family & attempted sale during November 1990., Then again advertising as a single-family during May 1991 & sold it as a single-family on June 13, 1991. The complaint also contended deceptive acts & practices after the sale., Per Mass. G.L. c.93A.

2. Prior to trial on May 8, 1992, Counsellor Merry deposed the Respondent. The Respondents sworn testimony is as follows.

A. "The discussions with the appraiser suggesting that the property should be treated as a single family, & others at the bank, "were all after the sale". (Pet. App. Q pages 27,28,29,30, 33,57,58.).

B. Respondent presented a Three (3) page code inspection report by the City of Worcester dated "June 20, 1991". which contained "No Square Footage Violation". (Pet. App. Q page 91).

C. Respondent presented two appraisals which were treated as a single family by the ATR appraiser., one appraisal dated November 1, 1990 & the second appraisal dated May 17, 1991. "Both of these appraisals contained "Zip Code 04604".

3. As a result, petitioners paid their counsellor to depose the ATR appraiser. "the ATR appraiser was not deposed".

4. Petitioners filed appeal July 1992 & paid $585.00 for trial transcript which was included & argued on appeal thru the U.S. District Court, through briefs & Reply Briefs., That:

A. At trial, A two page code report was in the evidence note-book, from which the trial judge reads. (Pet App P)

B. The Trial Judge was making a decision on a case without seeing the missing page., which contained the June 20, 1991 date., "Respondent became aware of the code report", "After the Sale."(Pet. App. O). (Pet App H.)

C. At trial, the Attorney's letters were admitted into evidence: "Which showed that for months after the sale Respondent blamed the code report for selling the property as a single family. (Pet App. attached to this brief 1A, 1B, 1C, 2A, 2B, 2C, 2D).

D. "The Trial Judge Stated:" "I'm not sure that they're going to add anything, Very Frankly, but I'll admit them". (Pet App. 3B page 53 thru 55 attached to brief).

E. At Trial, The Undeposed ATR Appraiser was "surprised to learn that the "Zip Code" on both appraisals presented at Deposition & at trial was the area for "BANGOR MAINE". (Pet.App. 3A Page 39 line 16 thru Page 40 Line 12, attached to this brief.)

F. Petitioners Property is Located in Worcester, Massachusetts.

G. Petitioners were in possession of a 2-family "Use & Occupancy Permit"., which contianed "No Zoning Restriction or Violation". (Pet App. A page 7, Line 7 thru 11).

H. There was "No Zoning Violation" by the code inspection department. (Pet. App. Q Page 91). or (Pet App O), or (Pet App P).

5. Prior to trial Petitioner Linda Simone was deposed by the respondent..

6. At trial, as a result of Petitioner Linda Simone being in the aisle when the sequester was called, she was escorted out of the court room along with her son Dante Simone who was also schedualed to testify, by the court officer (Joseph Walker).

A. She demanded thru the court officer to be allowed back into the courtroom and that she was the plaintiff in the matter & a mistake was being made.

B. The court officer told her to wait in the lobby while he checked her demands with the trial judge.

C. The court officer returned & told her she had to remain in the lobby.

D. As a result of remaining in the lobby, she & her observed the petitioners counsel, the respondents counsel, the respondent, & the ATR Appraiser, during a brief recess in between their testimony, go into a small room off the lobby for 5-10 minutes, then returned & resumed testimony.

E. Linda Simone was sequestered from the entire proceeding, she never re-entered the courtroom. Her testimony would have impeached the ATR appraiser, because she escorted the ATR appraiser through the property during the November 1990 appraisal of the property, and was aware that the ATR appraiser appraised the property as "Two-Family". (Pet App H).

F. Petitioners briefs on appeal to U.S. District Court, which were submitted to the U.S Court of Appeals in appendix form showed that petitioners did not recieve a fair trial & that as a result caused aggrevation, emotional distress & financial damages.

G. Immediately after trial, Petitioners cousellor told both petitioners & their son Dante Simone., That: "The trial was a Set-Up".

7. As a result of petitioners counsels' statement to them & as a result of his meeting in between testimony, petitioners dismissed him.

8. The U.S. District Court Order of December 21, 1993 "Was Not based on the "Record".,& is clearly erroneous as a matter of fact & Law.(Pet App A). and the reasons are as follows:

A. This Order never addressed Petitioners argument regarding Linda Simone's improper sequestration.

B. Only as a result of petitioners motion for reconsideration did this court request a copies of the "trial transcript". which was June 23, 1994. The second District Court Order. (Pet.App.B).

C. The third Order of the U.S. District Court dismised petitioners motions, & stated that Linda Simone was sequestered pursuant to counsel after reviewing the transcript. (Pet. App. C).

9. While on appeal to the U.S. Court of appeals petitioners became aware that the "Original file folder" at the U.S. Bankruptcy court where the trial originated became "Missing". All exhibits, the note-book from which the trial judge, & evidence. (Pet App D & E). & (Pet App 4 attached to this brief).

10 The Opinion of the U.S. Court of Appeals is Clearly erroneous & in error as a matter of fact & Law: and the reasons are as follows:

A. The Simones' brief contains myraid vague and unsupported claims of tampering with evidence and improper behavior by counsel for both parties. We reject those claims as completely unsupported by the record.(Pet App G footnote).

"The error here is that the court removed all of the petitioners argument which "was supported by record" & shown in Briefs/reply briefs through the U.S. District Court & through a 50 page brief before the U.S. Court of appeals.

"The court Erroneously placed a blanket over the petitioners briefs on appeal".

" The district Court order of December 21, 1993 which was shown to be clearly erroneous, gave some credibility to the petitioners argument"., (Pet App. A page 4 "B. WCIS Motion for Sanctions)

District Court Stated: The allegations are presented in conclusory form and are entirely without supporting evidence. "Perhaps they are frivolous, but not all of the Simones' appeal may be so characterized."

B. The U.S.Court of Appeals stated in its opinion that: " The ATR appraiser explained its decision to treat the dwelling as a single-family"." (Pet App G page 5).

"This is in error & clearly erroneous in that";

The court based this opinion without the deposition as has been shown, "The Respondent stated at deposition that the conversations with the appraiser suggesting to treat the dwelling as a single-family were "After the Sale".

Further, the attorneys' letters show that for months after the sale the Respondent "blamed the code report" as their reason for selling the property as a single-family.

The attorneys' letters show that in august of 1991, as a result of research at the liabrary, petitioners counsel advised the respondents counsel that the property had been advertised as a single-family during November 1990 many months prior to the code report of May 1991.

C. The opinion of the U.S Court of appeals stated: "Plaintiffs auctioneer "only" testified that if the property were advertised as a two family, it would have attracted a "different audience". (Pet App G page 5 1st paragragh).

This Opinion is in error & clearly erroneous as a matter of fact & Law:

and the reasons are as follows:

Petitioners auctioneer "also testified" that:

He appraised the Property as a "Two-Family"., on two occasions, 1988 and again in 1991. (Pet App N page 113 line 10 thru line 22).

He "Also testified" that two-familys' are worth more., than single families. (Pet App N page 118 Line 11 thru line 14).

D. The opinion of the U.S. Court of appeal stated: "It agreed with the District Court that by moving for the seqestration of witnesses specifically & including Linda Simone, and by failing to object during the bankruptcy proceeding to the sequestering of Linda Simone, the Simones' waived the issue."

"The opinion further stated that: moreover the Simones' have failed to show any prejudice as a result of Linda Simones' exclusion from the court-room". (Pet App G page 12).

This opinion is clearly erroneous & in error as a matter of fact & Law in that:

" On appeal since 1992, petitioners have maintained that it was the petitioners who requested a seqester of witnesses in the "first place" & the reason for this is that the Respondent was deposed & admitted that the property was treated as a single family "after the sale"., & the ATR appraiser who performed the appraisals was "Not deposed".

"Petitioner Linda Simone was "Deposed by the Respondent".

"Petitioners have always showed both courts that Linda Simone demanded to gain entrance into the courtroom through the court officer(Joseph Walker)., "Who told her that he would check with the trial judge".

"Petitioners have always argued that the court officer never told the trial judge that the plaintiff in the matter was improperly sequesterd."

"Petitioners have always shown the court that the trial transcript could not reflect her de-

mands." because the court officer never checked with the trial judge, Linda Simone & her son obseved him go into the courtroom & came right back out, he never approached the trial judge..

"Petitioners argued that the error was on the court through the court officer who was working under the direction of the trial judge.

"Petitioners argued that if the court officer had checked with the trial judge, as he told her he would, then any reasonable person would have to believe that the trial judge would have brought this to the attention of both counsellers, & then that would have been reflected in the trial transcript."

Petitioners have argued that Linda Simones', who had been deposed, testimony would have impeached the testimony of the "Undeposed ATR appraiser"., because linda Simone escorted the ATR appraiser thru the property on Nov 1, 1990 appraisal.

Petitioners have argued & showed that Linda Simones' rights to a fair trial were violated, & that, she was barred from an action that she brought, & that both petitioners financially damaged, caused emotional distress & agrevation. (Pet App. H)
(The above was argued additionally in briefs & Reply briefs on appeal to the U.S. District Court which were filed in petitioners appendix on appeal to U.S. Court of appeals).

E. The U.S. Court of appeals stated that: "A motion for recusal was not made to the bankruptcy court". (Pet App G page 13).

This opinion is clearly erroneous & in error as a matter of fact or law in that:

"Petitioners could not have brought this motion before the bankruptcy court, because petitioners became aware of the trial judge's close relationship with the Respondents counsel Lucille Brennan during February 1994."
(filed in briefs on appeal U.S. Court of appeal)

F. The opinion of the U.S. Court of appeals stated: WCIS admits that its counsel "from October, 1978 through June 1985... was a paralegal employed at the law firm of Bodwitch & Dewey and during that time often worked with judge Queenan,

who during that same period, was a lawyer and member of the firm.(Pet App G page 13).

REASONS FOR GRANTING THE WRIT

I.

Respondent adopted "background" in (Pet App A). The U.S. District Court Order dated December 21, 1993, was clearly erroneous in error as a matter of fact & Law", & could not have been based on the record".(Pet App.A).

1. The Order never addressed petitioners arguement regarding petitioner Linda Simones' Rights being violated at sequester process.

2. The U.S. District Judge wrote the decision on December 21, 1993, then ordered both parties to submit copies of the transcript 6 months later on June 23, 1994.(Pet.App.B paragraph 3).

II

The Attorneys letters shown in the facts of this brief, shows the deceptive acts & practices by the Respondent., per Mass.G L. 93A.

"For the trial judge to conclude that the Respondent acted in good faith, is clearly erroneous & in error as a matter of fact or law".

The Sworn deposition of the Respondent admitted that all meetings & discussions suggesting to treat the property as a single family "were all" "after the June 13, 1991 sale".

"Both appraisals" contained the "Zip Code" of Bangor, Maine., When in fact petitioners property is located Massachusetts., For the trial Judge to conclude that the appraisals were reasonable & that the appraisal firm is qualified is "Clearly erroneous & in error".

For the Trial Judge to conclude that the property "would" have been in violation of the zoning ordinances, when in fact it "was not" & there were "No Zoning Violations" against the property at time of sale, is "Clearly erroneous & in error as a matter of fact or law".

All of the facts shown were presented on appeal in Briefs & Reply Briefs to the U.S. District Court, & then all of the above was presented in appendix form along with a 37 page Brief to the U.S. Court of Appeals. & then by stating that the petitioners brief was vague & myraid, blanketed petitioners argument., & Led the U.S. Court of Appeals to Rely on the testimony of an "Un-deposed ATR appraiser", who had been seen take part in a meeting in-between testimony with Respondent, Respondents Counsel, & Petitioners Counsel., When in fact, these were the two persons who caused a sequester to take place at that trial.

The evidence which was not in the evidence notebook at trial., & Then the notebook became missing "while petitioners were on appeal to the U.S. Court of Appeals"., is in violation of U.S. Bankruptcy Rule 9024 60b., Mistake, Inadvertance, or Fraud.

For the Court to conclude that the "Deposed Petitioner Linda Simone, who was the Co-Plaintiff in the matter, was properly sequestered & showed no prejudice is Clearly Erroneous & in Error as a matter of fact & Law per Fed.R. 615.

PETITIONERS ARGUE HERE: THAT THEY COULD NOT & DID NOT RECIEVE A FAIR TRIAL, THUS THEIR RIGHTS TO DUE PROCESS WERE VIOLATED.

CONCLUSION

For all the forgoing reasons, & reasons in Petitioners petition, Petitioners Respectfully Request This Honorable court to Grant the Writ.

Dated February 19, 1996

RESPECTFULLY SUBMITTED

Richard & Linda Simone, Pro-Se
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Worcester, Ma. 01604
Tel: (508) 752-0795

Garrity & Levin
99 Summer Street
Boston Ma. 02110
Tel (617) 330-5030

Levin, Garrity, & Merry

Lucille Brennan
Fletcher Tilton & Whipple
370 Main Street
Worcester, Ma. 10608

July 12, 1991

In Re: Forclosure Sale of 62 Harold St. Worc. Ma.

Dear Lucy:

Thank you for your telephone call last week responding to my inquiry concerning the position of WCIS on 62 Harold Street.

As I indicated to you, my client Mr. Simone has provided me documentation concerning the status of this property as a two family home. I enclose for your review that docu;m;entation, which includes, as you can see, a loan made by WCIS on the basis of the building being a two family home; and a code inspection certificate from the City of Worcester certifying the dwelling as a two family home.

"When we spoke, you indicated that the bank's decision to advertise and sell this property as a single family home was based on recent code inspection" information suggesting that the basement apartment does not fully comply with relevant housing & building codes. I submit to you that code violations do not change the essential nature of a property. Where such documentation exists that this property has been certified & occupied as a two family home for a number of years and has been used to collateralize loans as a two-family home, a current status of being out of compliance with building codes does not transform the property into a single family home.

It appears conceivable, if not likely, that other interested parties, in an effort to reduce the sale value of this property may have requested the current inspection on which the bank relies in hope that code infractions might reduce the appraised value of the property (as apparently in fact happened).

BEST AVAILABLE COPY

My experience with housing inspections suggest that the vast majority of rental properties in Massachusetts have code violations of varying degrees at any given time. Many such code violations are readily remediable, often with minimal investment of time & money.

Mr.Simone remains persuaded that this property is a proper two-family home, notwithstanding whatever code violations may have been discovered during a recent inspection. Accordingly, he still believes that the bank has deprived him of a major financial asset which could go a long way towards improving his current situation in bankruptcy. Perhaps provision of the code inspection report showing the violations in the second unit within this home could shed additional light on this peculiar development.

I look forward to hearing from you with any further thoughts you have.

Very truly Yours
Garrity & Levin

7/12/91 "S_____"
Paul H. Merry

Fletcher Tilton & Whipple
370 Main Street Worc. Ma. 01608

July 15, 1991

Ms. Beverly J. Twine
Consumer Council of Worcester County
340 Main St, Rm 370
Worcester, Ma. 01608

Re: Your Case No. 91-06-7481
Complainant: Richard Simone. Our Client: WCIS.

Dear Ms. Twine:

Please be informed that this office represents WCIS in connection with the above-identified matter. Please accept this letter in response to the Complaint of Mr. Simone.

I appears from the Complaint that Mr. Simone suggest that the foreclosure sale held by WCIS on "June 13, 1991 was improper" in that the house was advertised as a single family house. Mr. Simones' complaint indicates that he believes it should have been advertised as a two family. "In response to his allegation, I enclose a copy of the code inspection report issued by the City of Worc. on May 17, 1991." Said report notes three significant violations concerning the basement unit which Mr. Simone, in the past, rented to tenants. After reviewing the report, I believe you will aggree with WCIS that it would have been improper for WCIS to advertise the house as a two family house when the rooms in the basement unit were not considered habitable. (See Violation #3).

In conclusion, WCIS believes that the foreclosure sale and the accompanying advertising was proper.

Should you have any questions, please do not hesitate to contact the undersigned.

Very Truly Yours

"S_____
Lucille B. Brennan

APPENDIX 1b

Fletcher, Tilton & Whipple
370 Main Street Worcester, Ma. 01608

Paul Merry, Esq.
Garrity & Levin
99 Summer St. Boston Ma.

July 16, 1991

Re: 62 Harold Street, Worcester.

Dear Paul:

I am in reciept of you letter of July 12, 1991, regarding the above-identified property.

After reviewing you letter and the accompaning enclosures, I can certainly understand your client's confusion. However,"in view of the enclosed Inspection Report, it is the position of WCIS that the advertising of the sale, as well as the sale itself, was commercially reasonable."

As you will note, the violations numbered #3,4 & 5 are not minor violations or readily remedile. The violations constitute significant and serious structural violations. Further #3 states that the rooms are not considered habitable. "The bank, having notice of these violations, would have been misrepresenting the property to advertise it as a two family house.

In addition, it appears that Mr. Simone was well aware of the manner in which the house was being advertised prior to the sale. Yet, he chose to raise his objection after the sale. Further, Mr. Simone knoew of the code inspection report. If he felt the report was erroneous, why did he not mention it to the bank, directly or through counsel. In that you an I had discussed the forthcoming sale in connection with the confirmation of the Order granting relief from stay, he certainly had an opportunity to raise the issue.

"In conclusion, it is WCIS's position that the foreclosure sale was conducted in a commercially reasonable manner and that the house was properly advertised given the code inspection report."

If you wish to discuss this matter, please do not hesitate to contact me,.

Very Truly Yours

"S_____

Lucille B. Brennan

APPENDIX 1C

Garrity & Levin
99 Summer Street Boston Ma.

Lucille Brennan, Esq.
370 Main St. Worc. Ma.

August 7, 1991

In Re: Forclosure Sale of Simone Propperty
62 Harold Street, Worcester.

Dear Lucy:

Thank you for yours of July 16, 1991 addressing the issue of the above sale. I regret I cannot subscribe to the position adopted by WCIS with respect to this matter, and must now make formal demand under Section 9 of Chapter 93a for a reasonable settlement offer with respect to this situation. Furthermore, please be advised my client has authorized me to file a Motion in the Bankruptcy Court seeking to set the sale aside.

The reasons for this position of Mr. Simone are as follows: First, as noted in my earlier correspondence, building code violations in a dwelling unit certainly do no mean that the unit no longer exists or is automatically uninhabitable. If this were the case, I am confident half the moderate and low income units in the Worcester residential market would be unavailable.

"Additionally, however, it is clear that WCIS advertised this dwelling for sale as a one-family as early as November of 1990, many months before the inspection (which took place in May of 1991) on which the bank now relies to rationalize its action." I believe I forwarded to you a photocopy of the newspaper advertisement for the November sale. If not I will be pleased to provide one.

Having advertised this dwelling in this way at that time, the bank may already have contributed to confusion over the nature of the property in the minds of buyers, and may therefore have discouraged some potential bidders. A claim for interference with advantagous contractual relations may also lie, as the erroneous November advertisement may have come to the attention of the purchaser with whom Mr. Simone had a purchase and

sale agreement. It was this purchaser, (at the time a tennant in the first unit of the home) who requested the May code inspection.

As you are aware, both the advertising which the bank did in November of 1990 and in May of 1991 was done despite the fact that the bank had previously loaned money to Mr. Simone relying on the full value of the house as a two-family. "Furthermore, Mr. Simone informs me that the bank has at least two appraisals for the property, both of which describe the house as a two family; and the bank also purchased or received evidence of insurance which indicated that the house was indeed a two family dwelling.

Mr. Simone also states he was unaware of the nature of the banks advertising until following the sale. In fact, his son attended the sale and learned for the first time of the bank's erroneous representation of the nature of the property at that time. Thereafter, Mr. Simone went to the liabrary to research the advertising and discovered the error.

Mr. Simone furthermore informs me that he recieved notice of the code violations in the unit on or about May 23, 1991, which suggests that the bank's adverisement appearing in the Sunday newspaper May 26, 1991 was in all likelihood prepared and sent to the newspaper prior to the bank's notification of the code violations.

With respect to the specific violations themselves, Mr. Simone informs me that they are substancially in error. Specifically, as to violation one, the decking has been repaired and does not pertain to the second unit. Violation two also relates to tenant owned property and does not bear on the second unit. With respect to violation four Mr. Simone informs me the bathroom has not only a window but a ventilation fan, either of which alone would satisfy the code requriements. The inspector was apparently confused on this point because the tenant in the unit had covered the bathroom window with some plastic material which may have hidden it from view. Concerning violation five, Mr. Simone informs me there are six (6) windows in the second unit for the four rooms that comprise that unit, and that accordingly this violation is also erroneous.

With respec to violation three, arguably the most serious problem, Mr. Simone informs me that double or triple carpeting was provided in the unit. This carpeting added somewhat to the apparent floor level, which may have caused the reported inadequacy of the florr to ceiling height; and can be remedied by removing the carpeting.

Irrespective of the nature and seriousness of the code violation, however, their pressence does not render the value of the second unit in this property a nullity such that it deserves no consideration in the advertising and sale of the house. Even if remedying the defects (whose actual presence has, as noted, been questioned by Mr. Simone) requires a significant investment, the fact that the unit has been cerified as occupiable in the past, has been occuped continuously, and is permitted under applicable zoning, contributes substancially to the value of this property.

It should not need argument that advertising a dwelling as a single-family attracts a dramatically different kind of clientel than advertising it as a two family. Indeed, it is kpossible that knowledgeable buyers would have specifically been discouraged from paritcipating in the sale on the assumption that this prope;rty was a single-family in a neighborhood zoned for two-family residences, generally a less desirable investment. In all events, buyers specifically seeking multi-family or investment properties would immediately have decided against pursuing this offering.

Given the full range of circumstances surrounding the advertising and conduct of this sale, including the bank's prior knowledge both by an appraisal and via insurance that the property is a two-family; the long standing permitting and occupancy of the second unit as a residence; and the timing of the advertisments in relation to the notification of the code violations, it appears to Mr. Simone that the bank made a serious error to his material financial detriment. Clearly, had the property been advertised and represented as being what it is (an "as is" sale has in the past been conducted under circumstances where code violations are present), it could reasonably be expected to have to have produced a significantly greaters return than in fact occured.

Accordingly, it is Mr. Simone's position that the sale as con-ducted was not commercially reasonable and was in fact in violation of applicable statutes.

Therefore, I look forward to learning from you the bank's settlement offer. As you are no doubt aware, failure to make a reasonable settlement offer within thirty (30) days of receipt of this letter exposes the bank to possible double or triple damages and the possible assessment of costs and reasonable attorneys fees.

Reasonable settlement of this dispute, in Mr. Simone's view, would require payment of a true value for the property (as indicated by the agreed sale price reached by Mr. Simone and the buyer with whom he had a purchase and sale agreement); and Mr. Simone's reasonable attorneys fees in pursuing this dispute.

Thank you for your continuing, attention to this matter, and I will look forward to your clients response.

Very Truly Yours
Garrity & Levin

"S_____"
Paul H, Merry

Garrity & Levin
99 Summer Street, Boston Ma. 02110

Lucille Brennan, Esq.
Fletcher Tilton & Whipple
370 Main Street
Worcester, Ma. 01608

August 12, 1991

In Re: Richard Simone Chapter 13 Debtor

Dear Lucy:

Please accept this as my request for a copy of the appraisal of property at 62 Harold Street Worcester, Ma., formerly owned by Richard Simone, which your client, WCIS conducted prior to its foreclosure sale on this property in June of this year.

Thank you for your anticipated cooperation.

Very Truly Yours
Garrity & Levin

"S_____"
Paul H. Merry

APPENDIX 2b

Garrity & Levin
99 Summer Street Boston, Ma. 02110

Defendants Exhibit
#8

Certified Mail # P981874749
President
WCIS
365 Main Street
Worcester, Ma. 01608

September 11, 1991

In Re; Consumer Protection Act Demand Letter
on Sale of 62 Harold Street

Dear Sir or Madam:

Attached to this letter please find a photocopy of a letter dated and sent August 7 of this year to your counse, Attorney Lucille Brennan, describing the circumstances of the above sale of real estate which constitute unfair and deceptive practices. Attorney ethical Rule 7-104 forbids direct contact between an attorney and a party the attorney knows to be represented by an attorney of its own without the consent of that attorney. However, Attorney Brennan has asked that the letter be sent to you.

As you see, the letter details the circumstances under which Mr Simone's former home, a two-family dwelling, was advertised on two separate occasions, and subsequently sold (bought by WCIS) as a single-family home. Advertising the house as a single-family could hardly be expected to attract buyers interested in multi-family or investment property; and this error by the bank has damaged Mr. Simone to the extent of the difference in value between the two properties.

The letter also makes notes the statutory provision of a thirty-day period in which the bank may make reasonable settlement offer, in the absence of which it may be exposed to payment of double or triple damages & attorneys' fees in the event a court finds in Mr. Simone's favor.

This letter with the attachment, represents Mr. Simone's demand for a reasonable offer of settlement as provided for in the statute. I look forward to your response.

"S_____"
Paul H. Merry

APPENDIX 2C

Fletcher Tilton & Whipple
370 Main Street Worcester, Ma.

Paul H. Merry, Esq.
Garrity & Levin
99 Summer Street
Boston ,Ma. 02110

Certified Mail
October 10, 1991

Re: Your Client: Richard Simone
Our Client: WCIS

Dear Mr. Merry:

Please be informed that this office represents WCIS. WCIS has received your letter of September 12, 1991 setting forth demands pursuant to G.L. c. 93A in connection with the foreclosure sale of 62 Harold St. in Worcester. This is in response to said letter.

Upon review of the circumstances and facts surrounding the sale, our client denies that it engaged in any unfair or deceptive acts or practices. Without restating all of the relevant facts, it is true that WCIS advertised the subject property as a single-family home. However, given the fact that the Department of Code Inspection for the City of Worcester issued a report which stated that the rooms in the basement did not meet required standards of habitability, WCIS contends that the advertisements as such were warranted. Further, it is true that WCIS advertised the dwelling as a one family in November 1990. However, an appraisal, conducted prior to the placement of the November advertising, noted that several aspects of the basement did not appear to meet code standards. Thus, it was treated as a single family residence with an unfinished basement. It is WCIS' position that although Mr. Simone chooses to assert that the subject real estate should have been advertised as a two family, to advertise the property as such, given the condition of the property at the time in question, would have certainly deceived and misrepresented the condition of the property to prospective purchasers.

As to the specific violations noted by the code inspector, you state that Mr. Simone claims "they are substaintially in error".

However, at no time prior to the sale, did Mr. Simone ever notify anyone from the bank that the violations were in error. It was not the obligation of WCIS to insure the accuracy of the content of a report issued by the department of Code Inspection prior to the foreclosure sale. In addition, to this date, noone has shown WCIS anything that would indicate that the code inspector's report was erroneous.

As to your allegation that the sale resulted in Mr. Simone suffering material financial detriment, WCIS does not agree that if the property had been advertised as a two-family that it would be reasonable to expect such a sale to have produced a greater return. On the contrary, if the property had been advertises and sold as a two family, given the condition of the property, it is quite possible that a lesser return would have been garnered from the sale.

All in all, WCIS is unwilling to pay Mr.Simone what he claims to be the true value for the property. Actually, it is surprising that Mr. Simone would claim that the value of the property is the sale price reached by Mr. Simone & a prospective buyer. It was my understanding that the buyer not only was unable to obtain financing for the purchase, but, also was the party that requested the May Code inspection. It would seem that the purchaser had some concerns about the property & its alleged value.

In conclusion, WCIS cannot & will not meet Mr. Simone's demand. However,in spirit of compromise & in the settlement of this matter, WCIS is willing to waive the deficiency claim that WCIS has against Simone under the subject notes & mortgages. This offer of settlement is not to be constued as an admission of wrongdoing by WCIS. If this offer of settlement is acceptable, please let me know within 10 days of your receipt of this letter.

Very Truly Yours

"S_____"

Lucille B. Brennan

Q You said in november 1990?
A Correct.
Q The Court: I'm sorry. Would you reat that question please.
Mr. Merry: I asked, your honor, when the observation about the window was made.
The Court: When was what we're reading here made in May of 91?
The Wirness: Yes.
By Mr. Merry:
Q. And the observations were made in Nov. 1990 about the window size. Is that correct?
A. That is correct.
Q Could you please point for me to the place on the Nov. 90 appraisal where there's any-- strike that. Miss Comeau, when you prepared these two appraisals, did you rely on the Nov. appraisal in producing the May appraisal?
A. No.
Q You stareted over again from scratch?
A. Yes. The only piece of information which we had to rely on is the assumption that the basement was in the same condition as we originally inspected.
Can you tell his honor what the zip code indicated for this piece of property was on the appraisal, both appraisals,

in fact?
A. On the May 91 appraisal the Zip code was 04604. On the Nov 90 appraisal the Zip code was 04604.
Q. Do you know where that Zip Code's located?
A I'm not sure what your asking.
Q Do you--
A Do I know what area that encompasses?
Q Yes.
A No, I do not.
Q Okay. Would it surprise you to know that that's Bangor Maine?
A Yes.
Q Did you ever see 62 Harold St without a swimming pool there?
A Ms. Brennan: Objection. Its been asked and answered several times.
The Court: It has been. The witness really has given her best memory, which she admits is a bit vague.
The Witness: Can I say something your honor?
The Court: You want to elaborate?
The Witness: All I wanted to say--
The Court: Go ahead.
The Witness:--was that if I hadn't noticed it is because that the market does not recognize--
The Court: If you hadn't noticed it or noted it?

Mr. Merry: I have shown it to Miss Brennan.
The Court: And that takes care of it?
Ms. Brennan: Yes, Your Honor. If he submits the complete one.
The Court: All Right. Well, let's have that then, if you--if that's--if you want to propose that now.
Mr. Merry: I'd be glad to, your Honor--
The Court: And What else?
Mr. Merry: Mr. Head is coming to the stand in the future, and we can do it through him--
The Court: And What else?
Ms. Brennan: Your honor, the other objection I have is regarding letters that Mr. Merry has included in his book which are between him and myself. Other than the 93A demand letter and our 93A response, I think they're irrelevant. They are not affidavits--
The Court: What--
Ms. Brennan:--of the parties.
The Court: What exhibit letters are these?
Mr. Merry: I and J your honor, on the second page of the index.
The Court: Whats the relevancy?
Mr. Merry: Your honor, the bank advertised and sold 62 Harold St. as a single family. Within days of-within one day of that occurance, they learned that

they'd made a mistake,& they began to try to rationalize their conduct, & the letters reflect that they used these purported and, in fact, found code violations which did not occur until many months after the first advertisement of the house as a single-family. They attempted to use that as a basis for rationalizing their erroneous and misperceived sale of the house and the letters from Attorney Brennan Substantiate that and my letters to Attorney Brennan requesing appraisals which were never responded to, the request was never responded to tend to show that--

The Court: These are two letter from you, Correct? We're talking about I and J?

Mr Merry: You honor, actually there is--there are several letters in each category.

The Court: I see.

Mr Merry: I think they're bundled together.

The Court: Uh-huh.

Mr Merry: The letter of Ms. Brennan on July 16 shows the banks reliance, both on the first page in the first-paragraph and in the--on the second page in the first--second paragraph there's a specific reliance upon a code inspection report of which the bank was unaware until June 20, seven days following the sale of the house.

The Court: What do you say, Miss Brennan?

Ms. Brennan: Your honor, I would respond that

again, those letters are not testimony of my client. They are not affidavits. I believe the 93a demand letter and the 93A response letter, your honor, are sufficient and they set forth the facts.

The Court: Well I'll admit them. I'm not sure that they're going to add anything, very frankly, but I'll admit them. So at this point, the--I have on this list in the notebook, into evidence at this point, because there's no objection, or if there's been an objection, I've overruled it. Exhibits numbered 1 thru 6 and Exhibits these are all plaintiffs exhibits, exhibits lettered A thru R. Now, perhaps, there was something else that came in We've had an S, have we?

Mr Merry: I'm sorry your honor. I mistook-S would be the last item that I offered, which was specifically the transcript of Mr. Roettgers deposition.

The Court: The Transcript?

Mr. Merry: Yes, Your Honor.

the Court: Okay. All right. Go ahead.

(where upon Defendant's Exhibit 1 thru 6 are admitted into evidence.)

Whereupon plaintiff's Exhibit A thru R are admitted into evidence)

DIRECT EXAMINATION By Mr. Merry:

United States Court of Appeals
For the First Circuit

No. 94-1957

RICHARD SIMONE AND LINDA SIMONE,
APPELLANTS

V.

WORCESTER COUNTY INSTITUTION FOR SAVINGS,
APPELLEE

ORDER OF THE COURT

Entered November 23, 1994

Appellants motion for investigation is Denied.

Appellants appendix of additional items is provionally accepted subject to the panel later striking or disregarding any items which are not properly part of the record.

By the Court

"S_____"
Francis P. Scigliano
Clerk.

APPENDIX 4 A